

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of)	
)	
Review of Regulatory Requirements)	CC Docket No. 01-337
For Incumbent LEC Broadband)	
Telecommunications Services)	

REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent local, competitive local, long distance and wireless divisions, hereby respectfully submits its reply to comments filed on March 1, 2002 in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding

I. Introduction.

In its comments, Sprint argued that ILEC provision of broadband services should be examined in the context of mass market and large business services and that, while market conditions in either segment do not support complete deregulation of ILEC broadband services, competition in both segments justifies a good measure of pricing flexibility and tariff filing relief. While Sprint's positions are more middle of the road than others, the record reflects a significant amount of support for these positions.

Before turning specifically to other parties' comments, it is worthwhile to identify the issues with which this proceeding was designed to deal and those, which it was not. This proceeding, notwithstanding what some parties have argued,¹ is not about UNEs or Section 251 obligations. It is not the purpose of this docket to create or eliminate UNE

¹ See, BellSouth Comments at 46 where BellSouth argues the Commission should take this opportunity to eliminate existing unbundled network elements.

obligations; those issues are concurrently before the FCC in the UNE Triennial Review.² Nor, as several parties noted,³ is this proceeding intended to pursue further regulatory relief for traditional ILEC special access services. Finally, this proceeding does not address the provision of wireline broadband Internet access services. Issues involved with the regulation of such services are currently pending before the Commission in the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities docket.⁴

Rather, in the instant NPRM the Commission seeks comments on what "regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service."⁵

II. A finding of nondominance is not required to grant some regulatory relief to the ILECs.

By and large, commenters focus on whether ILECs are dominant in the provision of broadband services. Predictably, the RBOCs argue that they have never been dominant in broadband services. Virtually all other parties take the opposite view. Sprint believes that the narrowband world is evolving to a broadband world and that Covad best described the appropriate approach to the dominance issue:

The goal of this proceeding is to develop a regulatory framework for incumbent LEC provision of broadband telecommunications services

² Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 01-361, released December 21, 2001.

³ See, Comments of Time Warner Telecom at p. 1 and NPRM at para. 22, wherein the Commission stated: "We note that we are not considering whether traditional special access services belong in the larger-business market for advanced services as these services are governed by the Commission's pricing flexibility regime."

⁴ CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42, Released February 15, 2002.

⁵ NPRM at para. 1.

that strikes an appropriate balance between creating necessary incentives to deploy such services, to promote competition, and to reduce regulation. Covad submits that, to the extent the Commission determines that any adjustments to its current regulations are necessary, the Commission should utilize its forbearance authority under section 10 of the 1996 Act to provide any targeted regulatory relief for incumbent LEC provision of broadband services that the Commission believes is warranted by the record developed in this proceeding. Section 706 of the 1996 Act specially contemplates that the Commission would utilize its section 10 forbearance authority to promote the deployment of advanced services.

Such an approach is preferable to any attempt to define product markets and assess incumbent LEC market power in order to determine whether they are dominant or non-dominant. ... For example, for the reasons discussed below, incumbent LECs should continue to tariff their DSL services. A designation of nondominance may make it difficult to continue (or re-impose) this requirement. This is not to say, however, that tariff filing requirements could not be streamlined, rather than eliminated, through the use of the Commission's forbearance authority. The Commission may consider, for example, permitting tariffs to go into effect on one day's notice and easing certain cost support data requirements.⁶

Again, Covad's position is largely consistent with Sprint's. While the ILECs are still dominant in the provision of the telecommunications services that are the necessary inputs to broadband services, there is sufficient competition in both the mass market and large business market to warrant -- without a finding of nondominance -- regulatory relief.⁷ Such regulatory relief should include one-day tariff filings, relief from cost support filings, and pricing flexibility, including the ability to offer contract tariff pricing.

⁶ Comments of Covad Communications Company at pp. 4-6.

⁷ The record in this proceeding, in particular the filings of the RBOCs and other ILECs, including Sprint's, more than demonstrate that there is competition in the provision of broadband services to both residential and business end users, and Sprint will not take the Commission's time to simply repeat what has already been stated. Additionally, there is ample Commission precedent for relying on competition as a trigger for granting pricing and tariff flexibility for the ILEC provision of services for which the ILECs are still clearly dominant -- special access. *See, e.g., In the Matter of Access Charge Reform, CC Docket No. 96-262*, 14 FCC Rcd 14221 (1999)(subsequent history omitted). In this regard, the Commission can grant appropriate relief without resort to the forbearance process under §10 that Covad emphasizes.

III. The Commission's broadband analysis should focus on at least two product markets: mass market and large business.

Many commenters argue that dividing broadband into two market segments is not sufficient for regulatory purposes; they argue that there should be three: mass market or residential, smaller businesses and work at home, and larger businesses.⁸ As pointed out above and in its Comments, Sprint continues to believe that the use of two product markets—mass market and larger business market -- is appropriate, but Sprint has no objection to the creation of a third market for small business and work at home. Sprint believes the outcome will be the same regardless of whether there are two or three product markets. In Sprint's view, there is sufficient competition to warrant some regulatory relief in all of these market segments.⁹

Earthlink suggests that the Commission's examination of the mass market for broadband services is flawed. Earthlink argues that the ILECs only provide wholesale broadband transport and do not provide any retail services to end-users.¹⁰ Accordingly, Earthlink believes that the Commission cannot, for the mass market, look to the degree of competition from cable modems. While Earthlink's description of how broadband services are sold to end-users may be true for the RBOCs, it is not for all ILECs. Sprint's incumbent LECs' broadband tariffs do not restrict such services to ISPs and carriers; Sprint sells its tariffed DSL services directly to end-users. Moreover, Sprint believes that AT&T has the better argument in this regard:

... it is nonetheless useful to examine competition between cable modem services and DSL-based Internet access services, because the RBOCs

⁸ See e.g., Comments of the Ad Hoc Telecommunications Users Committee at pp. 6-10 and Covad at pp. 14-15.

⁹ Sprint reiterates, however, that the record does not support a declaration that the ILECs are nondominant in the provision of broadband services. In fact, just the opposite finding is required by the record.

¹⁰ Comments of Earthlink, Inc. at pp. 4-9.

virtually always market their DSL telecommunications services bundled with ISP services (that they claim are being provided by third parties.)¹¹

As AT&T recognizes, the existence of cable modem services does impact ILEC provision of DSL services. The underlying DSL service cannot be priced such that the bundled price for the package is noncompetitive with cable modem service. Accordingly, Earthlink is mistaken in suggesting that the Commission ignore the impact of cable modem services on ILEC DSL services in defining product markets in this proceeding. It is entirely appropriate for the FCC to place cable modem service and DSL service in the same product market for the purposes of this proceeding.

IV. The ILECs remain dominant in the provision of broadband services and all of the necessary inputs for such services.

While, in Sprint's view, the record demonstrates the existence of sufficient competition to support pricing flexibility and tariff filing relief for the ILECs, the record clearly does not support complete regulatory relief. The record is replete with evidence to the effect that the ILECs continue to maintain bottleneck control over the facilities necessary for the provision of intramodal competition in all broadband services, mass markets (including smaller business, work at home) and larger businesses.¹² Numerous parties¹³ agree with Sprint that the ILECs are still dominant in the provision of broadband

¹¹ Comments of AT&T Corp. at p. 38.

¹² If the Commission requires more evidence of ILEC dominance than presented in this proceeding, Sprint invites the Commission's attention to Sprint's Comments filed April 5, 2002 in the UNE Triennial Review, In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 and Sprint's Comments filed April 8, 2002 in the Accounting Relief Proceeding, In the Matter of 2000 Biennial Regulatory Review -- Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, CC Docket No. 00-199.

¹³ See, e.g., Comments of the Association for Local Telecommunications Services at pp. 7-8, Comments of Earthlink, Inc. at pp. 21-25, Comments of Time Warner Telecom at pp. 1-2 (dealing with special access services used to provide broadband services to medium and large businesses), and Comments of AT&T Corp. at 19-51.

services, or at least the necessary inputs to these services, and that, as a result, some degree of continued regulation is necessary. This is true in both the mass market, where the services provided by the ILECs are largely DSL services, and in the larger business market, with services such as frame relay and ATM.

As Covad points out with regard to DSL services, "... indeed the Commission's own Report to Congress issued just weeks ago concluded that the incumbent telephone companies collectively control 93% of the nationwide ADSL market."¹⁴ Covad goes on to point out that:

In terms of regulatory safeguards, Covad submits that a certain level of general Title II regulation remains necessary. It would not be in the public interest, for example, to detariff incumbent LEC xDSL services. Continuation of some tariffing requirements for ILEC xDSL services is particularly important for the wholesale market because ISPs and other entities utilize incumbent LEC xDSL services as inputs. A degree of general Title II regulation is also necessary to ensure that incumbent LECs comply with certain of their section 251 obligations.¹⁵

BellSouth and Qwest both point to the advent of fixed wireless access to the Internet as further demonstrating their lack of dominance in the mass market.¹⁶ However, the Commission's report to Congress on advanced services drives home the point that fixed wireless is no threat to RBOC dominance in broadband services in the foreseeable future:

At present, however, technical limitations have constrained the level and breadth of their overall deployment and their effectiveness in certain settings. Moreover, capital market conditions over the past year have slowed deployment. Many of the larger carriers have exited the market or significantly scaled back their operations. At this point,

¹⁴ Comments of Covad Communications Company at p. 3.

¹⁵ *Id.* at p. 6.

¹⁶ BellSouth Comments at 37-38 and Qwest Comments at p. 21.

terrestrial fixed wireless services have been deployed to a lesser extent than the traditional "wired" services, cable-modem and DSL.¹⁷

Likewise, in the larger business market, the ILECs are clearly still dominant, through their bottleneck control over the access services that are the necessary inputs to the broadband services ultimately sold to business end users. And, as the Section 271 and 272 interLATA restrictions are removed from the RBOCs, it is likely that they will extend their dominance and grow market share significantly.¹⁸ Sprint strongly agrees with AT&T that:

The only reason why the ILECs do not provide a particularly large share of the large business services on a national basis is that they are still largely confined by § 271 to providing such services on an intraLATA or "local" basis. Thus looking at national or regional shares is not a meaningful way in which to examine the extent of the ILECs' market power. Instead, the focus from a geographic perspective must be on the markets where the ILECs' true power has been allowed to manifest itself. These are the multi-point frame relay and ATM services provided within LATAs, which the ILECs dominate almost to the exclusion of other carriers.

When the legal restrictions on the market presence of the RBOCs are appropriately taken into account, it is clear under even the market-share driven test proposed by SBC, that the ILECs could not justify any across-the-board finding of non-dominance in the provision of data services to large businesses. Although SBC and its witnesses Crandall and Sidak never mention it, the data from the IDC reports on which they rely establishes that a customer desiring an ATM network that crosses LATA boundaries can choose among a number of carriers, none of which has more than a 30% share. But if the customer wants a "local" ATM network, it would ... generally confront a situation in which the RBOC in that area controls 90 to 100% of the service:

...

As interLATA restrictions are lifted, the dominant carrier and other regulations described below are the only things standing in the way of the [RBOCs' plans] to expand their dominance, first regionally and then nationally. The ILECs will still control essential bottleneck facilities and as a result will still be able to gain an unfair competitive advantage over

¹⁷ In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, Third Report, FCC 02-33, released February 6, 2002.

¹⁸ 47 USC § 271 and 47 USC § 272.

their rivals though discriminatory pricing and other discriminatory conduct, just (as discussed below) as they do today in the provision of the intraLATA services they are allowed to provide.¹⁹

V. The ILECs do not require a finding of nondominance to successfully deploy the facilities necessary for broadband services.

Finally, the RBOCs' purported need for a declaration of nondominance in the provision of broadband service requires scrutiny. The record is filled with RBOC claims that they cannot successfully and economically deploy broadband services unless all of their regulatory obligations and burdens are lifted through a declaration of nondominance.²⁰ The Sprint incumbent LECs have not found that to be true in their case, and Sprint does not believe it is true in the case of the RBOCs. Earthlink shares Sprint's opinion and convincingly demonstrates the fallacy of the RBOCs' "need" with regard to DSL services:

Moreover, the available evidence shows that Incumbent LEC ADSL services under existing dominant carrier regulation have been a remarkable success for the Incumbents. The Commission's *Third Report* and the U.S. commerce Department's *A Nation Online* have both convincingly demonstrated that broadband deployment, including that of Incumbent LECs, under the current regulatory regime continues to move forward rapidly. The Commission has noted that Incumbent LECs provide 93% of the ADSL in the market, while the "deregulated" DLECs have only a 7% share, and that "Incumbent LECs added customers at a much faster rate than competitive LECs between the third quarter of 2000 and the third quarter of 2001." Comparing Incumbent LEC ADSL residential and business line growth rates with those of cable, the FCC's data also shows that the Incumbent LECs' growth significantly exceeds that of cable.²¹

¹⁹ Comments of AT&T Corp at pp. 25-26.

²⁰ See, e.g., BellSouth Comments at pp. 21-27, Comments of SBC Communications, Inc. at pp. 65-67, and Comments of Verizon at pp. 5-8.

²¹ Comments of Earthlink, Inc. at pp. 33-34.

VI. Conclusion

For the reasons stated above and in its Comments, Sprint urges the Commission to resist RBOC entreaties to be treated as nondominant in the provision of broadband services. Failing to do so will inevitably lead to the RBOCs leveraging their narrowband local monopoly into the broadband market – local and interexchange. At the same time, the Commission should either issue an order granting ILECs tariffing relief, including permitting one day tariff filings for broadband services, relief from cost support filings for broadband services and pricing flexibility in the provision of broadband services – including the ability to offer contract pricing -- or immediately commence an expedited proceeding to give ILECs such pricing flexibility and tariff filing relief.

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April 22, 2002

CERTIFICATE OF SERVICE

I, Joyce Y. Walker, hereby certify that I have on this 22nd day of April, 2002, served via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing letter, "In the Matter Review of Regulatory Requirements For Incumbent LEC Broadband Telecommunications Services CC Docket No. 01-337, filed this date with the Secretary, Federal Communications Commission, to the persons listed below.

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